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SUPREME COURT, U.S.

No. 06-1475

In The
Supreme Court of the United States

JOSHUA HALE, JOSEPH HALE, and ELISHABA HALE,

Petitioners,

v.

DIRK KEMPTHORNE, Secretary, United States Department of Interior; WILL TIPTON, Acting Superintendent, Wrangell-St. Elias National Park & Preserve; MARSHALL NEECK, Chief Ranger, Wrangell-St. Elias National Park & Preserve; DEPARTMENT OF THE INTERIOR; NATIONAL PARK SERVICE; FRAN MAINELLA, Director National Park Service; MARCIA BLASZAK, Regional Director National Park Service, all in their official capacities; NATIONAL PARKS CONSERVATION ASSOCIATION; THE WILDERNESS SOCIETY; and ALASKA CENTER FOR THE ENVIRONMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus Curiae, Mountain States Legal Foundation, will address the following question:

> Whether normal use and routine maintenance of a state-owned right-of-way is subject to federal approval and regulation?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, membership, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A majority of MSLF's members own property in the western states, *i.e.*, States with vast acreages of federal land.

Many of *Amicus*'s members own property interests that were granted under various federal land grants. Many of these members either actually settled the land that they own or are direct descendants of the original settlers. A significant number of these members own rights-of-way established pursuant to Sections 8 and 9 of the Mining Act of 1866, the Act of March 3, 1875, and the Irrigation or General Right of Way Act of 1891.

The Ninth Circuit's decision has disrupted the settled expectations of MSLF's members and will cause these members severe hardship with respect to the use and

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[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

enjoyment of their rights-of-way. Under the Ninth Circuit's decision, many of these members may no longer be able to enjoy their rights-of-way without significant federal government intrusion. Other MSLF members may be denied the ability to exercise their rights-of-way completely. If the Ninth Circuit's decision remains unchecked, MSLF members may not be able to exercise their rights-of-way, may lose significant value to their rights-of-way, and may be forced from their lands even though these vested property rights were preserved statutorily. Because *amicus* has a significant interest in the issue in this case, it respectfully submits this brief in support of the Petition for *Writ of Certiorari*.

STATEMENT OF THE CASE

In 2002, the Hale family purchased 410 acres of land near McCarthy, Alaska. Their property is surrounded completely by the Wrangell-St. Elias National Park and Preserve, which was created in 1980. *Hale v. Norton*, 476 F.3d 694, 696 (9th Cir. 2007). The Hales gain access to their property over what remains of the 13-mile McCarthy-Green Butte Road ("Road"). *Id.*

In the spring of 2003, the Hales' home burned down. *Id.* During the course of rebuilding their home, the Hales used a bulldozer to bring in supplies over the Road. *Id.* Shortly thereafter, the National Park Service ("NPS") posted a public notice that no motorized vehicles, except snow machines, could use the Road. *Id.* In July 2003, the Hales contacted the NPS Superintendent to request a permanent permit to traverse the Road with a D-4 or D-5 bulldozer and a 16-foot trailer. *Id.* The Superintendent responded, offering to assist the Hales in preparing the necessary applications for a right-of-way permit. *Id.*

Two months later, in September 2003, the Hales submitted an "emergency" application for a temporary permit, asserting that they needed to transfer supplies before "freeze up." *Id.* The NPS responded, by letter, requesting more information about the nature of the

emergency and the proposed use. *Id.* In particular, the letter articulated the NPS's concern that the Hales were planning to use a bulldozer over the Road before "freeze up." *Id.* The NPS noted that the common practice of inholders in the Park had been to use heavy equipment only in the winter months after the ground had frozen. *Id.* The frozen ground and snow cover, it asserted, would protect the earth from extensive damage. *Id.* Further, because the Hales' proposed use "[fell] outside of any environmental assessment previously undertaken by the Park," the Hales' permit request "[would] require[] a more extensive review under the National Environmental Policy Act ['NEPA']." *Id.*

Between September and October 2003, in a series of contacts, the NPS offered to prepare an Environmental Assessment ("EA") and make a decision in approximately nine weeks. *Id.* at 697. It also offered to waive the expense of conducting the EA. *Id.* In November 2003, the Hales initiated suit. Specifically, the Hales sought an injunction requiring the NPS to provide them "adequate and feasible" access to their property, as provided by the Alaska National Interest Lands Conservation Act. Further, they requested a declaratory judgment that the NPS was violating the Hales' right-of-way over the Road, a purported R.S. 2477 right-of-way, by requiring them to obtain a permit.

The District Court denied the Hales' requested relief and dismissed the case for lack of subject matter jurisdiction, No. 03-CV-357 (D. Alaska 2003). The Hales filed a timely appeal. On February 9, 2006, the Ninth Circuit affirmed the lower court's decision, *Hale v. Norton*, 437 F.3d 892 (9th Cir. 2006). The Hales petition for rehearing *en banc* was denied and the Ninth Circuit withdrew and superseded its prior opinion, *Hale v. Norton*, 461 F.3d 1092 (9th Cir. 2006). That opinion was also subsequently withdrawn and superseded by the opinion reported at *Hale v. Norton*, 476 F.3d 694 (9th Cir. 2007). In each opinion, the Ninth Circuit affirmed the lower court's

decision, holding that: (1) the court lacked jurisdiction to reach the merits of the case because the NPS had not issued a permit granting or denying the Hales' access; (2) the Hales' access to their property was subject to reasonable regulation under ANILCA; and, (3) the NPS could regulate the Hales' use of the Road even if the Road existed as a valid R.S. 2477 right-of-way. On May 9, 2007, the Hales filed their petition for *certiorari*.

SUMMARY OF THE ARGUMENT

In analyzing the Hales' ability to use the 13-mile McCarthy-Green Butte Road, which is a R.S. 2477 right-of-way, within the Wrangell-St. Elias National Park and Preserve, the Ninth Circuit ruled:

> [E]ven if the Hales have a valid right-of-way over the MGB road – which we do not decide – the existence of that right-of-way would not shield them from reasonable regulation by the [National Park Service].

Hale, 476 F.3d at 699. This ruling abrogates R.S. 2477 rights-of-way on federal land in violation of the common law, the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1785, and the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), 16 U.S.C. §§ 3101-3233.

R.S. 2477 rights-of-way are easements. As an easement, R.S. 2477 rights-of-way are afforded the same protections given easements under the common law that is, they are property rights protected by the Fifth Amendment, which confer valuable rights upon the owner. In addition to this protection, R.S. 2477 rights-of-way are also protected by federal statutes; therefore, federal regulatory authority over these property rights is limited.

Taken to its logical conclusion, the decision of Ninth Circuit also impermissibly allows an extension of federal regulatory authority over thousands of other property rights, including, *inter alia*, easements granted pursuant

to: Section 9 of the Mining Act of 1866, the Act of March 3, 1875, and the Irrigation or General Right-Of-Way Act of 1891. This Court should grant *certiorari* to reverse the Ninth Circuit's ruling because it is in direct conflict with existing common law and federal statutes, is overly broad, and is of great national significance, especially to the thousands of rights-of-way holders affected by the Ninth Circuit's decision.

ARGUMENT IN SUPPORT OF THE PETITION

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE NINTH CIRCUIT'S DECISION ABROGATES R.S. 2477 RIGHTS-OF-WAY.

A. R.S. 2477 Rights-Of-Way Are Property Rights.

1. Rights conferred pursuant to R.S. 2477.

Property is created and its dimensions defined by existing state, federal, and common law. One law creating rights in property was "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes," 14 Stat. 253 July 26, 1866 ("Mining Act of 1866").

Section 8 of the Mining Act of 1866, later designated as Revised Statute 2477, grants rights-of-way over public lands for the construction of roads: "The right of way for the construction of highways over public lands, not reserved for public uses is hereby granted." Mining Act of 1866 § 8 ("R.S. 2477"). R.S. 2477 remained in effect until its repeal by FLPMA, which though substituting a complex procedure for future rights-of-way on public lands, 43 U.S.C. §§ 1761-1771, preserved rights-of-way that had vested under R.S. 2477 prior to 1976. FLPMA §§ 701(a), (h), 43 U.S.C. § 1701, note; 43 U.S.C. § 1769(a). Management and administration of federal lands are thus limited by the existence of these grandfathered rights. *See Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988), *aff'd after remand sub nom., Sierra Club v. Lujan*, 949 F.2d 362

(10th Cir. 1991), *rev'd on other grounds*, *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

During the period that the R.S. 2477 grant was open – from 1866 to 1976 – the law was well-settled; that body of law assured rights-of-way holders complying with state law that their title was secure. The title conferred to the holder of a R.S. 2477 right-of-way is not fee title, rather it is an easement. *See Hodel*, 848 F.2d at 1083 ("Rights-of-way are a species of easement. . . ."). Easements are property rights protected under the Fifth Amendment: they cannot be taken without just compensation. *United States v. Welch*, 217 U.S. 333, 339 (1910); *see Block v. North Dakota*, 461 U.S. 273, 291 (1983) (explaining that a statute "depriving a State of land vested in it by the Constitution" would constitute a taking of the State's property without just compensation in violation of the Fifth Amendment). The holder of a R.S. 2477 easement has the right to use and maintain the easement. *See Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 748-749 (10th Cir. 2005) (defining scope of R.S. 2477 right-of-way) (hereinafter "*SUWA*"). These common law easement rights are in addition to the protections federal statutes afford R.S. 2477 easements. Similarly, because these are property rights protected by the common law and the Fifth Amendment, federal regulatory authority is limited.

2. R.S. 2477 rights-of-way are valid existing rights and cannot be diminished.

Title II of ANILCA created new and expanded existing national parks in Alaska, including the Wrangell-St. Elias National Park and Preserve, and placed the NPS in charge of the administration of those parks. 16 U.S.C. §§ 410h, 410hh(9). However, regulation of these new and expanded national parks is "*subject to valid existing rights.*" *Id.* § 410hh-2 (emphasis added). ANILCA could not be clearer

– the NPS cannot regulate in a way that invades or destroys "valid existing rights."

The phrase "valid existing rights" is a term-of-art and has been used hundreds of times in public land law. *See* Barkley and Albert, *A Survey of Case Law Interpreting "Valid Existing Rights" – Implications for Unpatented Mining Claims*, 34 Rocky Mt. Min. L. Inst. 9-1 (1988) (documenting the usage of the phrase "valid existing rights" in public lands statutes). By using this phrase, Congress understood that it had a general meaning. Furthermore, by choosing this phrase, instead of a different savings provision, Congress understood it was including within its scope even more interests than just vested rights. *See* Solicitor's Opinion M-36910 (Supp.) 88 I.D. 909 (Oct. 5, 1981) (interpreting "valid existing rights" as including more than "vested rights").

The term "valid existing rights" generally "refers to property rights, most of which are created by state law, protecting them from invasion or disparagement by the [federal government]." *Stupak-Thrall v. United States*, 89 F.3d 1269, 1285 (6th Cir. 1996) (*en banc*) (7-7 decision) (Boggs, J., dissenting). For a property interest to be protected as a "valid existing right" under ANILCA it must meet three conditions: (1) it must be a "right"; (2) it must be a right "existing" at the time of ANILCA's effective date; and (3) it must be an existing right that is "valid" under laws applicable to the right prior to ANILCA's effective date. A "right" is "an interest or title in an object of property; a just and legal claim to hold, use, or enjoy it, or to convey or donate it, as he may please." *Id.* at 1325. Congress established that title to property could be obtained over a right-of-way through the enactment of R.S. 2477. The word "existing" limits those rights protected from invasion by NPS regulations to those rights that predate

the enactment of ANILCA.[2] "Valid" means "legally sufficient or efficacious; authorized by law." Black's Law Dictionary 1550 (6th ed. 1990). Perfected R.S. 2477 rights-of-way are vested property rights. Federal courts interpret R.S. 2477 as a present grant of a right-of-way, the construction of which withdraws the land from the public domain. For example, in *United States v. 9,947.41 Acres of Land*, the district court held that a road constructed pursuant to R.S. 2477 was a property right such that:

> Title of the United States to the right-of-way passed from the United States . . . and ceased to be a portion of the public domain without any further action . . . [and] that, any subsequent disposition of the fee title of the land over which it passed was subject to such right-of-way.

220 F.Supp. 328, 335 (D.Nev. 1963). This R.S. 2477 property right requires the government to compensate the owner if the right is taken, and limits the ability of the government to manage the lands subject to the right-of-way. *See Block*, 461 U.S. at 291.

ANILCA's savings provision provides that "*Subject to* valid existing rights, the Secretary shall administer the lands . . . " 16 U.S.C. § 410hh-2 (emphasis added). The meaning of "subject to" is highly definite, that is, "subordinate" and "subservient." *Black's Law Dictionary* 1425 (6th ed. 1990). If the regulatory powers delegated to the NPS are sufficient to destroy certain rights-of-way in their entirety, it should be obvious that those regulatory powers are not limited by, let alone made "subordinate" or "subservient" to, those state-created rights. *See Stupak-Thrall*, 89 F.3d at 1285. Fulfilling the "subject to" condition

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[2] In this case, the Ninth Circuit did not address the existence or scope of the access right; it was assumed. *Hale*, 476 F.3d at 699 ("Consequently, even if the Hales have a valid right-of-way over the MGB road – *which we do not decide* – the existence of that right-of-way would not shield them from reasonable regulation by the NPS.") (emphasis added).

requires that the protected "valid existing rights" not be destroyed or disparaged by NPS regulation. *Id.*

To summarize, the plain and unambiguous meaning of "valid existing rights" in Title II of ANILCA protects from invasion or disparagement: (1) property rights (2) officially sanctioned by law (3) in existence on the date ANILCA was enacted. The Ninth Circuit never determined whether or not a property right was at stake; instead, that fact was inappropriately assumed. *Hale*, 476 F.3d at 699. Additionally, and contrary to law, the Ninth Circuit made the assumed property right subservient to federal regulatory authority when it ruled, "[c]onsequently, even if the Hales have a valid right-of-way over the MGB road – which we do not decide – the existence of that right-of-way would not shield them from reasonable regulation by the NPS." *Id.* Assuming the Hales have a valid R.S. 2477 right-of-way over the Road, then that land is withdrawn from the public domain. The federal government may not invade or disparage this right-of-way. However, this is exactly what the Ninth Circuit's ruling has done. The Ninth Circuit's ruling unlawfully allows federal regulation of rights-of-way on federal land exceeding the NPS's grant of limited authority under ANILCA. This Court should grant *certiorari* and reverse this decision.

B. R.S. 2477 Rights-Of-Way Are Property Interests Protected by The Common Law.

The Tenth Circuit, in *Sierra Club v. Hodel*, relied upon the common law of dominant and servient estates in its analysis of R.S. 2477 rights-of-way. That case, known as the Burr Trail case, dealt with the challenged expansion of an established R.S. 2477 right-of-way in Garfield County, Utah. The Burr Trail hosted a variety of uses from the late 1800s to the present, including mineral exploration, economic development, and tourism. *Hodel*, 848 F.2d at 1072. The combination of growing uses and county maintenance had created a R.S. 2477 right-of-way in favor of Garfield County. *Id.* The *Hodel* court held: "Rights-of-way

are a species of easement and are subject to the principles that govern the scope of easements." *Id.* at 1083. Therefore, the federal government, as servient estate holder, may not unreasonably interfere with the dominant estate holder's use of that easement. Restatement (Third) of Property (Servitudes) § 1.2.

While the rights of the dominant and servient estate do not change, the use of the easement may. In fact, "[t]he manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude." *Id.* § 4.10. This is an important benefit for all easements, including R.S. 2477 rights-of-way, as evidenced by the Burr Trail in Garfield County, Utah. For that road to be traveled safely by the increasing number of users, changes to the easement had to be made. However, while the servient estate holder has certain rights pertaining to the use of an easement, a servient estate owner may not preemptively restrict a dominant estate owner's use of an easement as provided by the ruling of the Ninth Circuit. The Restatement (Third) of Property notes:

> [T]he holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. . . . Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

Id.

Accordingly, if the dominant estate holder's use of the easement overly burdens the federal government's servient estate, the federal government is entitled to pursue remedies available through property and tort law, including injunctive relief and damages; however, the federal government may not preemptively restrict the dominant estate holder's use. This is precisely what the Ninth Circuit has ruled may happen. The Ninth Circuit has

ruled that the federal government, the servient estate holder, may preemptively restrict the Hales' use of their easement. This ruling is contrary to well established property law. The Hales merely wish to maintain their easement for safe passage to their inholding; a legal use, well within the rights of a dominant estate holder. In the event this use of the easement by the dominant estate holder unlawfully interferes with the servient estate, the exclusive remedy is to seek injunctive relief and damages, as every other servient estate holder is required to do. The servient estate holder, even where it is the federal government, may not preemptively restrict the dominant estate holder's use of the easement. This Court should grant *certiorari* to reverse this ruling by the Ninth Circuit.

II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE NINTH CIRCUIT'S DECISION ELIMINATES THE SAVINGS PROVISIONS IN FLPMA AND ANILCA.

A. The Ninth Circuit's Ruling Eliminates The Savings Provisions in FLPMA.

Federal regulatory authority over public lands is provided in FLPMA. Passed in 1976, FLPMA's purpose was to replace numerous laws and provide the Bureau of Land Management ("BLM") with a framework for managing its lands. 43 U.S.C. §§ 1701-1785. With FLPMA's passage, Congress declared a new policy of retention and conservation of public lands in federal ownership. 43 U.S.C. § 1701(1), (8). FLPMA directed the Secretary of the Interior to administer federal lands for multiple uses and to regulate uses to prevent "unnecessary and undue degradation of the lands." *Id.* §§ 1712(c), 1732(a), (b).

In order to manage rights-of-way on federal lands, FLPMA created a permitting procedure authorizing the Secretary of Interior to issue limited rights-of-way. *Id.* §§ 1761-1771. However, while this replaced the *in præsenti* grant provided by R.S. 2477, FLPMA Section 701(a)

expressly preserved all R.S. 2477 rights-of-way established prior to its enactment. 43 U.S.C. § 1701, note. This savings provision provides:

> [n]othing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.

Id.; *see also* FLPMA § 701(h), 43 U.S.C. § 1701, note, ("All actions by the Secretary concerned under this Act shall be subject to valid existing rights."); *see also* 43 U.S.C. § 1769(a) ("Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted.").

"Where a saving clause is appended to an act that expressly or impliedly repeals another enactment, the law repealed is continued in force as to existing rights and pending actions in accord with the terms of the saving clause." 1A Sutherland Statutory Construction (6th ed.) § 23:40. This Court has an established history of giving effect to saving clauses. *See Great Northern Ry. Co. v. United States*, 208 U.S. 452 (1908); *Hertz v. Woodman*, 218 U.S. 205 (1910); *Timken Roller Bearing Co. v. Pennsylvania R. Co.*, 274 U.S. 181 (1927); *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930). FLPMA expressly repealed R.S. 2477, but R.S. 2477 continued in force as to existing rights. FLPMA § 701(a), 43 U.S.C. § 1701, note. The language Congress chose could not be clearer, all rights-of-way shall not be terminated; R.S. 2477 rights-of-way established prior to October 21, 1976, shall remain in effect. Therefore, this savings provision must be given its full effect: all rights-of-way established prior to October 21, 1976, must be protected. These rights-of-way cannot be eliminated through the use of federal regulatory authority as the Ninth Circuit's ruling in *Hale* allows. *Hale*, 476 F.3d at 699. This Court should grant *certiorari* and reverse the Ninth Circuit's ruling.

B. The Ninth Circuit's Ruling Eliminates The Savings Provisions in ANILCA.

Because a R.S. 2477 right-of-way is a vested property right, Federal regulatory authority is limited. ANILCA explicitly honors and protects valid existing rights: it is clear that the regulatory authority of the NPS is limited by those rights. The Wrangell-St. Elias National Park and Preserve was established pursuant to Title II of ANILCA. 16 U.S.C. § 410hh(9). Title II contains a specific savings provision applying to ANILCA's newly created national parks and preserves and provides:

> *Subject to valid existing rights*, the Secretary shall administer the lands, waters, and interests therein added to existing areas or established by the foregoing sections of this title as new areas of the National Park System . . . .

Id. § 410hh-2 (emphasis added).

Additionally, Title XI of ANILCA provides for transportation in and across, and access into national parks and preserves in Alaska. *Id.* § 3161-3173. In enacting Title XI, Congress found that "Alaska's transportation and utility network is largely undeveloped and the future needs for transportation and utility systems in Alaska would best be identified and provided for through an orderly, continuous decisionmaking process involving the State and Federal Governments and the public." *Id.* § 3161. Within this statutorily created system of creating and managing transportation systems into and within the newly created and expanded national parks and preserves, Congress again included a savings provision protecting valid existing rights, providing, "Nothing in this title shall be construed to adversely affect any *valid existing right of access*." *Id.* § 3169 (emphasis added).

The language Congress chose could not be clearer, "*Nothing* in this title shall be construed to *adversely affect any valid existing right of access*." *Id.* § 3169 (emphasis

added). The Ninth Circuit's ruling eliminates this Congressional mandate. An individual cannot own a right if he must request permission prior to exercising that right. However, this is precisely the ruling of the Ninth Circuit in *Hale* and it adversely affects the Hales' R.S. 2477 right-of-way, their valid existing right of access. If the regulatory powers delegated to the NPS are sufficient to destroy rights-of-way, it should be obvious that those regulatory powers are not limited by, let alone made "subject to" those rights. *See Stupak-Thrall*, 89 F.3d at 1285. Fulfilling the "subject to" condition requires that the protected rights-of-way not be destroyed or disparaged by NPS regulation. *Id.* This Court should grant *certiorari* and reverse the Ninth Circuit's holding.

III. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE RULING OF THE NINTH CIRCUIT HAS NATIONAL SIGNIFICANCE.[3]

A. The Ninth Circuit's Ruling Affects Thousands of R.S. 2477 Rights-Of-Way.

R.S. 2477 was enacted to promote the congressional policy of westward expansion and development. *See SUWA*, 425 F.3d at 740-741. This *in præsenti* grant remained in effect until repeal by FLPMA in 1976 and was the authority for the creation of most of the roads in the western United States. *Id.* at 740. By 1976, thousands of R.S. 2477 rights-of-way existed. *See United States Department of the Interior Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way*

[3] A creative Justice Department attorney could make an argument that the Ninth Circuit's ruling grants broad federal regulatory authority over fee title, including title owned pursuant to: Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862), repealed by Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. 2787 (1976), The Desert Lands Act of 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. §§ 321-323), and the Preemption Act of Sept. 4, 1841, ch. 16, 5 Stat. 453 (repealed 1891).

Claims on Federal and Other Lands (June 1, 1993). In fact, it is impossible to determine the total number of grants because establishing a R.S. 2477 right-of-way required neither application nor action from state or federal government. *See, e.g.*, 43 C.F.R. § 2822.1-1 (1973). Furthermore, establishing R.S. 2477 rights-of-way required no administrative procedure: "no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested." *SUWA*, 425 F.3d at 741. Thus, "R.S. 2477 highways were constructed without any approval from the federal government and with no documentation of the public land records, so there are few official records documenting the right-of-way or indicating that a highway was constructed on federal land under this authority." *Id.* (internal citations omitted.)

Once a R.S. 2477 right-of-way is created, neither that right nor its scope may be diminished. While FLPMA authorizes the exchange of a R.S. 2477 right-of-way for a FLPMA right-of-way, such an exchange is not mandatory and FLPMA explicitly requires the consent of the holder of such right-of-way prior to such an exchange. 43 U.S.C. § 1769(a). This provision makes it clear that the government may not require the holder to give up a R.S. 2477 right-of-way. Thus, if a holder established a right-of-way prior to the passage of FLPMA, FLPMA requires the government to honor the right and its scope of that right-of-way. Given the applicability of the Ninth Circuit's decision to thousands of R.S. 2477 rights-of-way, this Court should grant *certiorari* due to the national significance of the question presented.

B. The Ninth Circuit's Ruling Affects Rights-Of-Way Pursuant to Section 9 of The Mining Act of 1866.

Similar to R.S. 2477's grant of a right-of-way over public lands for the construction of highways, Section 9 of

the Mining Act of 1866 grants rights-of-way over public lands for the construction of irrigation ditches. Section 9 provides:

> That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed.

Mining Act of 1866 § 9, 14 Stat. at 253. This provision, like R.S. 2477 was repealed by FLPMA. The FLPMA repeal of Section 9, however, was also made subject to valid existing rights. FLPMA §§ 701(a), (h), 43 U.S.C. § 1701, note; 43 U.S.C. § 1769(a).

Additionally, and again similar to R.S. 2477, "the extent of the right of way in point of width or area was not stated, and the grant was noticeably free from conditions. No application to an administrative officer was contemplated, no consent or approval by such an officer was required, and no direction was given for noting the right of way upon any record." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917).

The broad ruling found within the Ninth Circuit's decision in *Hale* impermissibly allows federal regulatory authority over these vested property rights. The Ninth Circuit ruled, "even if the Hales have a valid right-of-way . . . that right-of-way would not shield them from reasonable regulation by the NPS." *Hale*, 476 F.3d at 699. Given FLPMA's and ANILCA's preservation of valid existing rights, this ruling cannot stand. Just as R.S. 2477 rights-of-way are easements and are afforded the protections easements are entitled, Section 9 rights-of-way must also

be protected. When the dominant estate holder's use of the easement overly burdens the federal government's servient estate, then, and only then, is the federal government entitled to pursue remedies available through property and tort law, including injunctive relief and damages. The federal government may not preemptively restrict the dominant estate holder's use through impermissible regulatory authority as the Ninth Circuit's ruling allows.

C. The Ninth Circuit's Ruling Affects Rights-Of-Way Pursuant to The Act of March 3, 1875 and The Irrigation or General Right-Of-Way Act of 1891.

The Ninth Circuit's ruling also adversely impacts rights-of-way pursuant to both the Act of March 3, 1875 ("1875 Act") and the Irrigation or General Right of Way Act of 1891 ("1891 Act").

The 1875 Act, provides rights-of-way for railroad companies. The Act of Mar. 3, 1875, c. 152, § 4, 18 Stat. 483. The 1875 Act provides:

> Any railroad company desiring to secure the benefits of section 934 to 939 of this title, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, that if any section of said road shall not be completed within five

> years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

43 U.S.C. § 937. The Department of Interior explained that the 1875 Act "is in terms like" the 1891 Act and construed the two Acts similarly. *DeWeese v. Henry Investment Company*, 39 Pub. Lands Dec. 27, 32 (1910). This interpretation was adopted by both the Supreme Court of New Mexico and the United States District Court for the District of Montana. *United States v. Lee*, 110 P. 607 (N.M. 1910); *Roth v. United States*, 326 F.Supp.2d 1163 (D.Mont. 2003).

The 1891 Act provided for rights-of-way through public and reserved lands for irrigation purposes. 1891 Act, c. 561, § 18, 26 Stat. 1101. The 1891 Act provided:

> The right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage . . . to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and upon presentation of satisfactory showing by the applicant, such additional rights of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals. . . . Provided, that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation . . . .

43 U.S.C. § 946. The Act further explained the mechanism by which a canal or ditch company could avail itself of benefits under the Act, providing:

> Any canal or ditch company desiring to secure benefits of sections 946 to 949 of this title shall,

> within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of or subject to such right of way.

Id. § 947. "Section 946 does not confer any rights independently of Section 947, and the two statutory provisions 'are to be construed together.'" *Roth v. United States*, 326 F.Supp.2d 1163, 1169 (D.Mont. 2003) (quoting *Union Land & Stock Co. v. United States*, 257 F. 635, 639 (9th Cir. 1919)). "Section 948 broadened the scope of the Act, making it applicable 'to all canals, ditches, or reservoirs . . . whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps therein provided for.'" *Id.* (quoting 43 U.S.C. § 948). Similar to R.S. 2477 and Section 9 of the 1866 Mining Act, FLPMA repealed the 1891 Act but contained a savings provision preserving rights obtained under the 1891 Act prior to October 21, 1976. FLPMA §§ 701(a), (h), 43 U.S.C. § 1701, note; 43 U.S.C. § 1769(a).

Although rights-of-way pursuant to the Act of 1875 and the Act of 1891 were not directly at issue in *Hale*, the ruling is broad enough to burden them as well; the Ninth Circuit only referred to "rights-of-way" generally. Rights-of-way pursuant to the Act of 1891 and the Act of 1875 are no less important than rights-of-way established pursuant to the Mining Act of 1866. All of these rights-of-way are vested property rights; they are easements to be afforded the full protection of the law. Moreover, where the federal government is the servient estate holder, it may not use

regulations to preempt the easement holder from exceeding the scope of the easement. Preemptive regulation is unprecedented in the law of easements, but is exactly what is sanctioned by the ruling of the Ninth Circuit in *Hale*. *Hale*, 476 F.3d 694, 699. This ruling is wrong and flies in the face of well-established property law. The sole, exclusive remedy of the servient estate holder, even when that servient estate holder is the United States, is to seek injunctive relief and damages such as is the remedy for every other servient estate holder.

CONCLUSION

For the foregoing reasons, *Amicus Curiae*, Mountain States Legal Foundation respectfully requests that this Court grant the Petition for *Certiorari* in order to determine whether normal use and routine maintenance of a state-owned right-of-way is subject to federal approval and regulation.

Respectfully submitted,

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